UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

VESTA VFO, LLC

and **Case 04-CA-260273**

ANDREW DEFINIS,
an Individual

and **Case 04-CA-260277**

NICHOLAS DEFINIS,
an Individual

Edward J. Bonnett, Jr., Esq.,
for the General Counsel.
Donald Bamburg, Esq., and
Robert Perryman, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

KIMBERLY SORG-GRAVES, Administrative Law Judge. Based upon charges filed by individual charging parties Andrew Definis (Andrew) and Nicholas Definis (Nicholas)[1] against Vesta VFO, LLC (Respondent) on May 12, 2020, the National Labor Relations Board, Region 4 issued a consolidated complaint on August 12, 2020. (GC Exh. 1(a) and 1(i).)[2] I heard this matter on April 27 and 28 and June 2 and 3 via videoconference.[3] The parties and witnesses

[1] For clarity I refer to the Definis brothers by their first names with no disrespect intended.

[2] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits, "GC Brief" for General Counsel's posthearing brief, "R. Exh." for Respondent's exhibits, and "R. Brief" for Respondent's posthearing brief. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on the highlighted evidence, but also upon my review and consideration of the entire record, encompassing credible testimony, evidence presented, and logical inferences from the evidence. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

[3] Respondent Counsel verbally objected to conducting the hearing via videoconference which I denied on the record. Counsel did not raise the objection again in posthearing briefs; therefore, I do not address the matter further.

participated from various locations in Pennsylvania. I afforded all parties a full opportunity to appear, introduce evidence, examine and cross-examine witnesses, and argue orally on the record. Counsel for the General Counsel (General Counsel) and the Respondent filed post-trial briefs in support of their positions.

After carefully considering the entire record, including my observation of the demeanor of the witnesses, I find:

FINDINS OF FACT

Jurisdiction

At all material times Vesta VFO, LLC has been an employer that provided wealth management and financial planning services from an office and place of business in Lower Gwynedd, Pennsylvania, and engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act. (GC Exh. 1(i) and 1(k).)

Background

The Respondent is one of related companies[4] operated by Bill Coleman (Bill) and his sons Josh, Jeremy, and Justin.[5] (Tr. 66, 78, 331.) The following are the admitted supervisors and/or agents of Vesta: Josh Myers (Myers), chief investment officer; Bill Coleman, chief financial officer; Tom Povedano, chief operating officer; Justin Coleman, head of risk management; and Gregg Mallinder, head of project management. (Tr. 583, GC Exh. 1(i) and (k).) The Respondent complied and assessed performance and other asset information about the current holdings and prospective holdings of the related companies, other companies, investors, and other outside clients. (Tr. 64.) This information was used to advise its clients in investment opportunities. Josh Coleman was one of the Respondent's clients.

The Unfair Labor Practice Allegations

The Definis brothers' work for the Respondent

Andrew and his brother Nicholas applied for an investment analysis job advertised by the Respondent and were interviewed and hired by Justin. (Tr. 61–62; R. Exh. 1.) Andrew had prior employment with a company doing data management and quantitative analysis and performed work for his father's company in assessing the value of antiques, jewelry, precious metals, etc. (Tr. 63–64, 137.) Nicholas also worked for their father's business. Justin offered them an initial salary of $50,000 per year and agreed to renegotiate their salary after 3 months. (Tr. 68, 141; R. Exh. 1.) They started with the Respondent on January 7, 2019,[6] and were provided computers

[4] During prehearing conference calls, I informed the parties that the current decision would be limited to a determination as to the merits of the allegations and that any liability based a relationship between Vesta and any related entities would be handled in a subsequent compliance proceeding if necessary. (Tr. 10–13.)

[5] To avoid confusion, I refer to the Colemans by their first names with no disrespect intended.

[6] All dates herein refer to 2019 unless otherwise noted.

which allowed them to search the internet and access a restricted SharePoint site on which Respondent maintained shared files.[7] (Tr. 65, 67, 343, 344; R. Exh. 1.)

During their time working for the Respondent, in addition to managers and supervisors, approximately 9 other employees worked in the same office for the Respondent or one of its related companies. (Tr. 70.) Initially, they were supervised and assigned work by Justin, and starting in mid to late April Myers became their supervisor. They were also assigned tasks by Bill and Jeremy. (Tr. 67, 141, 154.) Most of their work consisted of searching the internet and internal SharePoint files for information that was pooled with information gather by others on their team to compile reports or dossiers on potential investments, investors, and clients. (Tr. 65, 67, 144, 146, 307–310, 484.)

Conversations about compensation and value of their work

On March 5, approximately 90 days after the Definis brothers started working Justin spoke with them about their agreement to review their salary after 90 days. Justin praised their work and asked them to postpone discussing a salary increase another 3 months because they were extremely busy with work at that time. (Tr. 90, 152, 153, 156, 350, 351; GC Exh. 27.) Sometime towards the end of April or the beginning of May, Myers became their supervisor. (Tr. 90, 345, 484.) They did not discuss their salary again until early August when Justin told them in passing that he would have to get Myers' input on their contribution at work after Myers had supervised them for a while. (Tr. 90–91, 157, 159.) On other occasions Justin made comments to them that the employees were all "in the same boat" with low base wages because their bonuses would be large. (Tr. 155, 352.)

I credit testimony of the Definis brothers, who lived and worked together, that they discussed their salary on more than one occasion as it would have been unusual for them to not discuss it. (Tr. 91, 315, 316, 353.) This testimony is supported by documentary evidence. (Tr. 91, 177, 178, 356, 357; R. Exhs. 5, 6, and 7.) As their employment continued, they started communicating with management about their contributions at work which they understood would affect their compensation. On September 2, Andrew sent a series of emails to Justin and copied them to Nicholas that where later cut and pasted into an email and sent to Myers. Andrew asserted that he and Nicholas were not receiving full credit for their work because others integrated their work into documents without giving them credit for locating and analyzing the information. (Tr. 91–94, 164; GC Exh. 19; R. Exh. 4.) After these emails circulated, they met with Justin and Myers concerning an employee that they asserted claimed their work as his own. (Tr. 162.) They again discussed their compensation and the number of hours they were working without any change their compensation. (Tr. 354, 355.) Shortly thereafter, the other employee's position was eliminated, and the employee was let go. (Tr. 177, 535.) The Definis brothers did not witness any animosity from management because they raised concerns about who was being credited for work. Myers saw this competitiveness as typical in this line of work. (Tr. 162, 165, 499.)

[7] The SharePoint files contained confidential documents such as financial statements, tax returns, and other documents submitted by clients and information placed there by the Respondent's employees. (Tr. 487, 488, 588.)

At various other times Andrew and Nicholas were present or involved in conversations where management officials discussed compensation in general terms such as that another person asked for increased pay. In these conversations other employees' actual compensation amounts were not mentioned. (Tr. 73, 172, 314, 315.) Even Myers was not fully aware of the salaries of those he supervised and admitted telling the Definis brothers, "if you know [others salaries], don't tell other people, you know? I mean, it's people's private information, don't spread it."[8] (Tr. 504, 506, 508.) Similarly, on various occasions they discussed the amount of revenue the work they performed would generate, but nothing specific was discussed about how that revenue would translate into compensation for them. (Tr. 181, 182, 315, 361, 505.) The Definis brothers and likely other employees were seeking to discuss how the company's profits would be shared, but management was not forth coming with answers to these questions. (Tr. 182, 183.) Myers, Justin, and other members of management continued to avoid directly discussing compensation. (Tr. 358, 361, 362.)

On October 13, Nicholas sent a more pointed email to Myers and copied Andrew. Throughout the email Nicholas uses collective pronouns to refer to himself and Andrew and notes their belief that they are "grossly underpaid" and that their lack of compensation is affecting their work. (Tr. 94, 166, 359, 360; GC Exh. 20.) They based their belief that they were underpaid on information they found on the internet.[9] (Tr. 184, 185, 188.) Nicholas informed Myers, "We've compiled a wealth of data supporting what we plan to present when negotiating our compensation for this year, next year, and long-term." (Id.) Andrew remembered meeting with Myers within a few days after this email and again generally discussed the concept of their salary and the possibility of a bonus without discussing any definitive amounts.[10] Myers shared that his base salary was one-third of what he used to be paid, again without revealing actual amounts. (Tr. 175, 179.) Again, the discussion of specific salary amounts was put off. This time to the end of the year. (Tr. 507; R. Exh. 6.)

Andrew finds documents saved on a shared drive

The Definis brothers assisted the Respondent with a "Cunningham" project from their first day of work and Nicholas was able to find some investment irregularities that he brought to the Coleman's attention. (Tr. 313, 386, 639.) The Cunningham project was discontinued in May 2019 because of litigation involving Cunningham. (Tr. 200, 311.) The Respondent implemented a litigation hold on all its Cunningham related documents. A database through and outside electronic storage company named iDeals was setup for the litigation hold. The employees were

[8] I note that neither Nicholas nor Andrew testified to such a comment. Further, I note that Counsel for General Counsel made no motion to amend the complaint to allege that this statement was a violation. Based thereon, I make no finding as to whether such a statement by Myers is a violation of the Act.

[9] Respondent attempted to solicit testimony about certain documents to show that the Definis brothers were using documents accessed through their work to support their argument for more pay. I credit Andrew's and Nicholas' testimony that their work with these financial documents was in relation to their regular work duties and not related to their claims of having collected information to support their assertion that they should be paid more. Nothing in the record contradicted their assertions. Furthermore, management never questioned the Definis brothers about these documents prior to their discharge. (Tr. 185-192, 377, 378, 380–382, 439, 430; R. Exhs. 8 and 9.)

[10] Nicholas did not recall meeting again. Regardless of whether Nicholas or Andrew misremembered when this conversation took place, the result was the same as other attempts to talk to management about their compensation. (Tr. 370, 371.)

directed to upload their Cunningham files to the iDeals folder. (Tr. 201, 202 599, 600, 602.) Also, an electronic search for documents, instant messages, and other electronic files was performed on Respondent's computers and databases and the netted electronic documents were placed in the iDeals file. (Tr. 204, 601.) Documents that are unrelated to Cunningham were netted and placed in the Cunningham iDeals file. Management officials and the employees did not understand the breath of documents pulled for the litigation hold. (Tr. 220, 221.) On November 7 to avoid the expense of the outside data storage, management directed one of the IT employees to place that file titled "Cunningham iDeals 11-7-19 backup" (Cunningham file) on Respondent's SharePoint site. (Tr 100, 102, 602, 637.)

Also, in November some resolution of the Cunningham litigation was reached. Myers and Bill both mentioned to the Definis brothers that the Respondent was again contemplating its business relationship with Cunningham. (Tr. 97–98, 503, 554.) It was not unusual for projects to start and stop and then be restarted. (Tr. 557.) On November 4, Nicholas and Andrew were assigned to determine if anyone had done a title check on a Cunningham property. (Tr. 195; R. Exh. 17.) Within a matter of minutes, Nicholas sent Myers a link to the title document. (R. Exh. 18.) The deed was not on the regular Cunningham SharePoint site. It was in an investment portfolio contained in a different file. (Tr. 222, 223, 392.) The Definis brothers' computer research skills and speed in locating information were considered assets that management appreciated. (Tr. 657, 658.)

On December 3 at about 3 p.m. while still at the Respondent's offices, Andrew had time back and forth between other work he was doing in connection with Nicholas reviewed information on Cunningham to prepare for expected future work. (Tr. 97, 103, 283, 399, 400.) Andrew accessed the Cunningham iDeals file on the SharePoint site where the employees regularly shared and pooled documents. I credit Andrew's testimony that he assumed it was the most up-to-date information on Cunningham, because the title noted that it was the 11/7/19 backup. (Tr. 224.) I find that it was a logical assumption based upon the title of the file and the types of files that were regularly shared on SharePoint. When he clicked to open the file, it did not immediately open like other SharePoint files because it was a zip folder that had to be saved to his company laptop before it was opened. (Tr. 100–101, 104.) Once the file opened it contained subfiles titled with employees' and management officials' names. (Tr. 611–613; R. Exh 19.) Andrew assumed the files were those worked on by each of the individuals related to the Cunningham project as that was the general practice with using SharePoint files.[11] (Tr. 290, 570, 571.)

The iDeals folder contained subfolders bearing the names of management and employees of the Respondent. The payroll document at issue in this case was saved under the following folder/subfolders: "Justin Coleman"—"justin coleman vestvfo.com"—"Documents"—"Microsoft Teams Chat Files." The Respondent's staff discusses and shares documents concerning projects through the Microsoft Teams chat function and the documents at issue were attached to chat messages shared by Justin and placed in the litigation hold file as a result of the electronic search. (Tr. 291.) There were numerous documents attached to Justin's chat files. Andrew scanned through them and opened a document listed as "loaded payroll." I credit

[11] VFO stands for Virtual Family Office. (Tr. 584.) Wealthy families often have an entity that manages their assets. (Tr. 585.)

Andrew's testimony that he expected that the document would be Cunningham's payroll. When he opened it, he found that it was the Respondent's payroll that also contained payroll for some of the Respondent's related companies' employees. (Tr. 101; R. Exh. 9, p. 41.) Neither members of management, nor the IT employee they directed to place the file on the SharePoint site, understood that any such documents were in the file. Myers testified that his employees would have expected Cunningham documents to be in the Cunningham file. (Tr. 537.) Management points to the various levels of folders and subfolders that came before the folder holding the document as evidence that Andrew must have intentional search for the document. This assumes that Andrew took a step-by-step approach and opened every file and document preceding the payroll document. Yet, management understood that Andrew and Nicholas were efficient at combing through electronic documents and pulling out information. (Tr. 657, 658.) I note that management took no measures to learn from Andrew and Nicholas how they came upon the documents but relied upon conjecture alone. Upon review of the folder names and the document's name in Respondent's Exhibit 19, I find that other than being a zip folder, nothing about the file names would have immediately put Andrew on notice that its contents were different than others he utilized on SharePoint. (Tr. 198, 199, 613–616; R. Exh. 19.) Additionally, if Andrew was intentionally trying to find the Respondent's payroll information, I see no logical reason why he would have looked there. Even Myers testified that the payroll document "was in a very remote location on the SharePoint, you know, with a non-descriptive title." (Tr. 516.)

Andrew testified that he reviewed the file between other tasks and did not review the entire file. Most of the documents he reviewed were related to Cunningham, but he later found other documents that appeared to be totally unrelated to Cunningham, such as documents from Justin's personal home remodel project. Similarly, these documents were saved under titles that did not readily inform him of the content of the files. (Tr. 218, 219, 274, 275; R. Exh. 19, p. 102–104.) Other document titles were more likely to suggest that they were Respondent's documents and not about Cunningham such as "Vesta Family Office," "VESTA offer Letter—Jeremy.docx," and "Greg Offer letter.docx." (R. Exh. 19, p. 103.) The record is unclear as to how many of the documents were personal or confidential records or exactly how many of them that Andrew accessed. (Tr. 277, 278, 280.) I credit Andrew's testimony that he initially thought that documents had inadvertently been placed in the file. Nicholas, Andrew, and Myers all testified that it was not unusual to find documents that were accidently uploaded into the wrong file. (Tr. 538.) Yet, I find that he at some point realized that he had a duty to tell management that he had found unrelated documents in the Cunningham iDeals file on SharePoint as is evidence by the fact that he did just that the next day.

Justin's and Nicholas' salaries were listed on the payroll document. (Tr. 106.) Prior to seeing the payroll document, Nicholas, based on statements made by Justin, Josh, Myers and some other employees, understood that others were working under a similar pay structure of a lower base salary with the expectation of a bonus once deals were completed. (Tr. 106.) The payroll document illustrated that those assertions were not correct and that the Definis brothers were the lowest paid employees. (Tr. 107.) Andrew instant messaged the document and its location on the SharePoint site to Nicholas. (Tr. 105, 199, 210, 211; R. Exh. 9.) When the link did not immediately open for Nicholas, he viewed the information from Andrew and did not access the Cunningham iDeals file. (Tr. 323, 395.)

Later that evening, Nicholas sent Myers an instant message through the Respondent's computer system stating that they had "reached an inflection point as additional items have warranted our immediate attention, evoking and prompting a natural response toward reaching out to you as it relates to the compensation structure." Nicholas asked Myers to meet with them as soon as his schedule permitted. (Tr. 107–109, 398, 403; GC Exh. 17; R. Exh. 9.)

The Definis brother's discussion with Myers

On December 4 shortly after arriving at work, Andrew sent an instant message at 9:18 a.m. to Justin, copying Nicholas. The message stated, "there are files of yours on the [C]unningham [S]hare[P]oint that should not be there." (Tr. 103, 110; GC Exh. 18.) Andrew did not specifically mention the payroll document. (Tr. 285, 286.) Around 9:30 a.m. Myers approached them at work and asked what had prompted them to reach out to him. (Tr. 110.) Andrew acknowledged that they had seen the payroll document and that it served as a reminder that they needed to raise the issue of their pay again. (Tr. 111, 212, 213, 511.) They explained that they had notified Justin that his personal documents were on the site. They explained that another employee had uploaded the files with the payroll document onto SharePoint. (Tr. 111, 512.) The three of them had a conversation about the Respondent's compensation structure and that they felt "betrayed" and "letdown" because they had not been given accurate information. (Tr. 213, 422.) Myers told them that he had learned that another individual was making a higher base salary than him and expressed his "similar feelings regarding" learning he was making less than that individual. (Tr. 214, 420, 514.) Myers expressed additional frustration when Andrew and Nicholas told him that they heard the Coleman family members discussing how the other individual was given a raise over the summer, and therefore, was making even more than Myers believed. (Tr. 215, 505.) Andrew asserted that he and Nicholas had found objective public information about how others in their positions were compensated and would use that to discuss what they believed to be fair compensation for their work. (Tr. 112, 213.) Myers did not express any hostility towards them for having raised the compensation issue or the fact that they had seen the payroll document. (Tr. 419.) The conversation lasted for about an hour without any resolution of their compensation concerns, but Myers said that he would discuss it with the Colemans. (Tr. 112, 215, 216, 424.)

Respondent's reaction

I give no credit to Myers' testimony that because Nicholas and Andrew told him they had informed Justin about the confidential documents on the SharePoint site, he did not initiate any action after ending their conversation and attended to other work. (Tr. 512, 514.) This testimony contradicts Nicholas' testimony and documentary evidence. After the meeting with Myers and a few hours after notifying Justin about personal documents being on the Cunningham iDeals folder, Nicholas was surprised to see that the Cunningham iDeals file was still on SharePoint. (Tr. 410.) When Nicholas attempted to open it, the zip file opened but every file in it was empty. (Tr. 410.) The record is unclear as to whether management had taken some action to limit access to the file.

At 1:05 p.m. that same day, Justin was having a difficult time locating the payroll document and sent an instant message to Myers stating, "[I] am still trying to find this freaking thing[.]" (R. Exh. 10.) It was not until 1:09 p.m. that Justin responded to Andrew's earlier message about the documents on the SharePoint site. Justin simply asked, "Where[?]" followed by another message asking "Energy+Canada?" (GC Exh. 17.) Nicholas replied at 1:10 p.m., "Cunningham App + Canada." Justin thanked him and then directed Nicholas and Andrew to delete the entire Cunningham file from their laptops, which they did, and Andrew informed Justin of such. (Tr. 105; GC Exh. 17.)

Based upon the instant messages sent by Justin, I find that Myers told Justin about his conversation with Andrew and Nicholas and the payroll document shortly after the conversation took place. Also, I find that the credible evidence illustrates that Justin's concern was the payroll list. There is no evidence that Myers specifically discussed what other personal documents were in the Cunningham iDeals folder. Justin's message to Myers refers to his attempts to find "this freaking thing," which indicates that he was looking for a specific document. The Respondent also claimed that Nicholas' response was evasive because it did not direct Justin directly to the payroll document, but Nicholas had informed Justin that there were files, not just a single file, that should not have been on the SharePoint site. Nicholas' response allowed for locating not only the payroll document, but other documents not related to the Cunningham project. At some point, Justin, Josh, and Myers developed a fuller understanding of the types of documents that were on the Cunningham iDeals site.

Andrew and Nicholas worked the rest of the day on the 4th and again on December 5 without any additional conversation about the issue. (Tr. 112, 287. 542.) On December 5, Justin sent an email to Myers stating:

> I want to lay out next steps to Josh and Dad:
> I'll sweep their computers with Yash,
> Myers will issue a warning shot regarding behavior and what he expects them to change or work on.
> Myers will complete job description detailing what their responsibilities are, as well as responsibilities they'll need to take on to increase their salary.

That same day Justin, Josh, Bill, Myers, and chief operating officer Tomas Povedano met to discuss the situation. (Tr. 620.) They discussed how the information found by Andrew was in a zip file with multiple subfolders. Myers testified that management concluded that Andrew and Nicholas must have been searching for information to have found the payroll and other documents in such a large multilayer file. (Tr. 519.) Povedano testified that in the meeting his position was that they should discharge them because of accessing the information. (Tr. 620, 621.) They discussed that the Definis brothers had accessed confidential client information, because Josh was a client of the Respondent. Povedano testified that they were concerned what Nicholas and Andrew might do with the confidential documents that they downloaded if they did not fire them and immediately confiscate their computers. (Tr. 652.) I give little credit to Povedano's testimony that management was concerned about them improperly utilizing confidential information beyond their request for raises. If management was truly concerned it makes no sense that they did not immediately confiscate their work computers to verify that all the files had been deleted and question them about whether they had shared or saved any of that

information elsewhere. Instead of acting on any real concern about the leak of confidential information, they tentatively decided to discharge them for a "breach of trust" but wanted to sleep on it before taking any action. (Tr. 519, 621–623.)

The discharge meeting

On the morning of December 6, the same group of managers met and discussed the process of discharging Andrew and Nicholas. Povedano testified that they decided that Myers and one of Respondent's inhouse counselors would conduct the discharge meeting. Myers took the following notes from the meeting to use later in the discharge meeting.

1. Search for information they should not have
    a. We have lost trust with you and that is the reason for termination
2. What they did with that information
3. Terminate for cause and they get unemployment

1. Earlier this week, you gained access to information you should not have, and what you did with that information has caused us to lose trust with you and as a result we have the right to terminate you for cause.
2. We are willing to offer you the option to be laid off which allow you to collect unemployment and not have this termination for cause on your permanent record. If you choose that option we will require you to sign a release and you will be able to collect two weeks worth of base pay as severance.
3. Release will be coming, NFP to contact
4. Need your keys to the building
5. We are going to escort you to your office to collect your personal belongings and then escort you out of the building

(Tr. 469, 623, 654; R. Exh. 14.)

Shortly after arriving at work on December 6, the Definis brothers received an instant message from Myers asking them to come to the conference room. (Tr. 115, 136, 326, 524.) The Respondent's inhouse counselor and Myers were in the conference room when Andrew and Nicholas arrived. (Tr. 523.) Their recollection of what occurred at the meeting is mostly consistent with Myers notes and testimony and the testimony of Respondent's inhouse counsel. While Myers claimed to have "continually said exactly what's on the script," his notes were more of a list and not a script that would sound correct if read directly. (Tr. 524.) Even the inhouse counsel testified that Myers was only referring to his notes as he spoke to them. (Tr. 469; R. Exh. 14.) Myers told them that based upon what they had done the Respondent could no longer trust them which was resulting in their immediate termination. (Tr. 327, 424, 448; Exh. 14.) Myers said that they had the choice to resign, or they would be terminated, and it would go on their permanent record. (Tr. 115, 232, 326, 327.) Andrew and Nicholas asked what they did, and Myers stated more than once that they knew what they were doing with the information. (Tr 524.) They asked Myers if accessing the payroll document was the problem and he stated that it was not. (Tr. 233, 327, 329, 431.) The inhouse counselor stated that they "were going to leverage confidential information for profit in the form of compensation" and referenced their conversation with Myers about the payroll document that they saw on December 4. (Tr. 115,

116, 328, 450.) The inhouse counsel testified that he was not involved in an investigation but was serving as a witness to the discharges. (Tr. 456.) He based his understanding of the discharges on what he was told by management and asserted the same reason for their discharge at the unemployment hearing. (Tr. 458, 463, 464; GC Exh. 7, pg. 10 and GC Exh. 8.)

Prior to this meeting, Andrew had not recognized hostility towards them for mentioning their compensation concerns, but management kept avoiding and putting the discussion off. (Tr. 236.) During the discharge meeting, Nicholas made a comment to Andrew, "You know what is happening right now?" Nicholas was implying that they were being discharged because of discussing a compensation increase with Myers on December 4. (Tr. 234, 328, 329; GC Exh. 7.) The inhouse counselor told them that the decision was final and that they were not going to discuss it. (Tr. 116.) They were escorted to turn in their computer and keys and then walked to the parking lot. Before leaving Nicholas again requested to tell their side of the story and was denied the opportunity. (Tr. 116, 234, 235, 236.) The record reflects that management took no steps to verify that the Definis brothers had not shared or saved any of the documents on the Cunningham iDeals file or otherwise interviewed either Andrew or Nicholas about what occurred.

Respondent's later claims of handbook and policy violations

During the discharge meeting, Myers never stated that Nicholas and Andrew had violated a specific rule contained in any handbook or policy, nor did the notes he referred to during the discharge meeting list a specific policy. Myers testified that they were discharged not for breaking a specific policy but that "[t]hey were terminated for breach of trust between them and us as their employer." (Tr. 534.) At their unemployment hearings, the Respondent again asserted that Nicholas and Andrew were discharged for attempting to leverage their newfound knowledge to get salary increases for themselves. (Tr. 119–126, 452, 453; GC Exhs. 7 and 8.) The Respondent did not point to the handbook or policy manual provisions as reasons for the discharge. After the unfair labor practice charges were filed, the Respondent asserted that these actions violated specific policies.

In the position statement submitted to the Region, the Respondent contended that the brothers accessed "highly confidential payroll data" and attempted to use it "to increase their base rates of pay." (GC Exh. 15.) The Respondent contended that these actions violated the Vesta Holdings, LLC Employee Handbook provision 5–12 Confidential Company Information which states:

> During the course of work, an employee may become aware of confidential information about Vesta Holdings, LLC's business, including but not limited to information regarding Company finances, pricing, products and new product development, software and computer programs, marketing strategies, suppliers and customers and potential customers. An employee also may become aware of similar confidential information belonging to the Company's clients. It is extremely important that all such information remain confidential, and particularly not be disclosed to our competitors. Any employee who improperly copies, removes (whether physically or electronically), uses or discloses confidential information to anyone outside of the Company may be subject to

> disciplinary action up to and including termination. Employees may be required to sign an agreement reiterating these obligations. (GC Exh. 15.)

The Respondent asserted at hearing that its employees were to abide by the Vesta Holdings, LLC Employee handbook and the Compliance Policies & Procedures Manual for VESTA Advisors, LLC (Policy Manual). But the Respondent did not directly assert that Andrew and Nicholas had violated the Policy Manual at the discharge meeting, at the unemployment hearings, or in the position statements submitted by the Respondent to the Region. (GC Exhs. 3, 4, 5, 7, and 8.) Andrew and Nicholas testified that they only recalled receiving the Vesta Holdings, LLC Employee handbook, but the Respondent circulated the Compliance Policies & Procedures Manual for VESTA Advisors, LLC by email on May 15. Andrew and Nicholas signed documentation verifying receipt of the Policy Manual email. (R. Exh. 3.) Myers testified that VESTA Advisors did not have employees and that he was the only registered investment advisor working for the Respondent. Myers was required to comply with the Policy Manual as an investment advisor pursuant to Security and Exchange Commission regulations. (Tr. 528–532.) Myers testified that he communicated to the employees his expectation that employees that worked with him adhere to these standards. (Tr. 533.)

The Policy Manual first lists the definitions of terms used in the manual and then sets forth the background or preamble to the policy which states:

> [Employees] may, under certain circumstances, engage in outside business activities. [Employees] should carefully consider any outside business activity, which conflicts with or has the appearance of conflicting with the business of the Company or its clients. Certain [employees] may be required to disclose outside business activities to clients in their Brochure Supplement (see Form ADV Disclosure Requirements).

The manual proceeds to list various types of information that employees must protect and not misuse such as: "private information regarding its clients and potential clients;" "non-public private information;" and "non-public personally identifiable information." The Respondent relies upon two subsequent portions of the policy which state:

> No Associated Person may utilize property of the Company, or utilized the services of the Company or its Associated Persons, for his or her personal benefit or the benefit of another person or entity, without approval of the COO. For this purpose, "property" means both tangible and intangible property, including funds, premises, equipment, supplies, information, business plans, business opportunities, confidential research, intellectual property, proprietary processes, and ideas for new research or services.
>
> Associated Persons will maintain the confidentiality of information acquired in connection with their employment, with particular care being taken regarding Nonpublic Personal Information. Improper use of the Company's proprietary information, including Nonpublic Personal Information, is cause of disciplinary action up to and including termination of employment for cause.

(R. Exh. 2, p. 07–08.)

ANALYSIS

General Counsel contends that the Respondent discharged the Definis brothers solely because they used accidentally acquired payroll information to jointly seek pay raises. The Respondent contends that they were discharged for inappropriately searching for confidential information and then using that information to seek higher wages, which caused the Respondent to lose trust in them to handle confidential information. If the Respondent discharged them for their course of conduct while engaging in protected concerted activity, then whether the discharges violate Section 8(a)(1) of the Act is analyzed by the standard set forth in NLRB v. *Burnup & Sims*, 379 U.S. 21 (1964). If the Respondent had mixed motives for discharging them, then the appropriate standard is that set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In *General Motors*, 369 NLRB No. 127, slip op. at 1–2 (2020), the Board extended the *Wright Line* mixed-motive test to cases in which an employee engages in a single instance of abusive behavior that, apart from its abusive nature, would be protected under Section 7. Based upon the parties' arguments, I apply both tests here.[12]

Burnup & Sims Analysis

Under *Burnup & Sims*, an employer violates Section 8(a)(1) of the Act if it interferes with employees' exercise of their Section 7 rights. Disciplining employees for the exact conduct which constitutes protected concerted activities violates the Act regardless of the employer's motive, absent some corresponding conduct that removes them from the protection of the Act. Id. at 22–23. "In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." Id. at 23. To meet the *Burnup & Sims* standard, the General Counsel must initially establish that the employee engaged in protected activity and that the employer acted against the employee for conduct associated with that activity. In re *Detroit Newspaper Agency*, 340 NLRB 1019, 1024 (2003). The burden then shifts to the employer to demonstrate an honest belief that the employee engaged in misconduct. Id. Upon that showing, the burden shifts back to the General Counsel to show that the misconduct did not occur or that it was not serious enough to forfeit the protection of the Act and warrant the discipline. *Detroit Newspaper Agency*, 340 NLRB at 1024; *Burnup & Sims*, 379 U.S. at 23 n.3.

[12] *Wright Line* is inapplicable where an employee's discharge is based upon a single act. See *Five Star Transp., Inc.*, 349 NLRB 42, 46 fn.8 (2007) (holding that where employer made hiring decisions based on letters to school committee, "the only issue presented is whether the letters constituted protected conduct"); *Am. Steel Erectors, Inc.*, 339 NLRB 1315, 1316 (2003) (explaining that "*Wright Line* analysis [is] unnecessary in [a] single-motive case"); *Phoenix. Transit System*, 337 NLRB 510, 510 (2002) (holding *Wright Line* inapplicable where employer discharged employee "because of the articles he wrote in the union newsletter," which "constituted protected concerted activity"); *Nor-Cal Beverage Co.*, 330 NLRB 610, 612 (2000) (holding that "Respondent can rely on no independent motive" where the reason for discharge was a protected activity).

Protected Concerted Activity and Respondent Knowledge

I find that the General Counsel met the burden of establishing that the Definis brothers were engaged in protected concerted activity for the purpose of mutual aid or protection. Nicholas' December 3 communication with Myers makes clear that he and Andrew were seeking to discuss their compensation with him. On December 4, Andrew and Nicholas expressed to Myers their desires for pay raises. Employee discussion of wages with each other and concertedly with management constitutes protected activity for the purpose of mutual aid or protection. See, *Cordua Restaurants, Inc.*, 368 NLRB No. 43, slip op. at 4 (2019), enfd.985 F.3d 415 (5th Cir. 2021) (finding employee engaged in protected concerted activity by discussing issues relating to his wages with his coworkers); *East Village Grand Sichuan Inc. d/b/a Grand Sichuan Restaurant*, 364 NLRB No. 151, slip op. at 1 fn. 2 (2016) (discussions of terms and conditions of employment, including wages, that preceded the filing of a lawsuit constituted protected concerted activity); *International Business Machines, Corp.*, 265 NLRB 638 (1982). Because they jointly expressed their mutual wage concerns to Myers, the Respondent was aware of this activity when it discharged them for conduct arising from the circumstances connected to their protected activity. Thus, I find that the record establishes the Definis brothers engaged in concerted activity, that the Respondent was aware of that activity, and that the Respondent discharged them for engaging in conduct associated with that activity.

Alleged Misconduct

Therefore, the burden shifts to the Respondent to demonstrate an honest belief that the employees engaged in misconduct that removed them from the protection of the Act. In cases involving the access and use of confidential information, the Board considers the circumstances surrounding the employee's conduct to determine whether it removes the employee from the protection of the Act. In cases where the alleged misconduct involves the use of allegedly confidential information, "the applicable rule is that employees are entitled to use for organizational purposes information and knowledge that comes to their attention in the normal course of their work activity but are not entitled to their employer's private or confidential records." *Ridgeley Mfg. Co*., 207 NLRB 193, 196–197 (1973), enfd. 510 F.2d 185 (D.C. Cir. 1975) (administrative law judge finding with Board approval that an employee's sharing of employee names gleaned from timecards stored in open view by the timeclock with a union was protected activity); see also *W. R. Grace & Co.*, 240 NLRB 813, 820 (1979) (finding no violation of the Act for the discharge of an employee who claimed that the wage information that she shared had mysteriously and anonymously appeared on her desk because the employer could have reasonably believed that she surreptitiously obtained the information to which she did not otherwise have access). Application of this rule is fact-specific, with no clear lines defining confidential information versus information that comes to an employee's attention in the normal course of work.

Respondent contends that the Definis brothers did not access the payroll and other confidential information in the course of their work but engaged in misconduct by searching through the Cunningham iDeals file to find confidential information. In arguing that Andrew and Nicholas' conduct was protected, General Counsel points to Board's affirmation of the administrative law judges' finding that employee dissemination of other employee's names and

contact information to a union was protected activity in *Rocky Mountain Eye Center, P.C.*, 363 NLRB 325 fn. 1 (2015).[13] In *Rocky Mountain Eye Center* the employee information was maintained on a computer application to which employees had open access for work duties and were directed to find contact information for fellow employees on that system when needed. Id. at 333–334. The General Counsel also relies upon *Gray Flooring*, 212 NLRB 668 (1974), in which the Board found unlawful the discharge of an employee for copying and sharing with a union the names and telephone numbers of other employees from schedule rosters posted near and documents found on a supervisors' desk. The employees regularly accessed the area around the supervisors' desk and retrieve information and documents from the supervisors' desk. Considering the circumstances, the Board found that the employer did not have a legitimate expectation that the information would be kept confidential. Id.

I find that the facts in the instant case are not closely aligned with those that the Board relied upon in finding that the employees used information that they accessed through the normal course of their work activity in *Ridgeley Manufacturing, Rocky Mountain Eye Center,* and *Gray Flooring*. In this line of cases the Board found that the employees had regular access to the employee information that they shared. Therefore, the employers could not successfully argue that the information was held confidential and that the employees breached that confidence in connection with their otherwise protected concerted activity. Here, Andrew and Nicholas did not have regular access to the payroll information that Andrew found. While I credit, as discussed above, that Andrew was engaged in his normal work activities when he accidentally came across the payroll document, I find that his accidental access to the information was unlike the regular employee access to information that the Board deemed as within the employees' normal course of work in *Ridgeley Manufacturing, Rocky Mountain Eye Center,* and *Gray Flooring*.

I find that the instant case is more analogous to the facts in *International Business Machines Corp. (IBM)*, 265 NLRB 638 (1982). There, an employee accidentally received payroll information with other paperwork and shared the information with other employees to concertedly pursue equality in pay for fellow employees. Id. The confidentiality agreements in *IBM* clearly prohibited the sharing of internal confidential documents, such as payroll information, with other employees but did not prohibit employees from discussing their wages amongst themselves. The employee was aware of the confidentiality policies when he shared the payroll information. Id. The Board acknowledged the importance of wage information to protected concerted activities and employees' right to discuss wages, but also acknowledged an

[13] The parties discuss other cases in which the Board found that similar activity under certain circumstances would not be protected. See e.g., *Asheville School, Inc.*, 347 NLRB 877 (finding that a payroll accountant who possessed special custody of wage and salary information was aware of her duty to keep the information confidential and lost the protection of the Act when she breached that duty by sharing salary information with staff not privy to that information); *Cook County College Teachers Union*, 331 NLRB 118 (2000) (that providing the employer's directory of management officials' home addresses and telephone numbers to her collective-bargaining agent for her benefit was not protected or concerted activity); *International Business Machines Corp*., 265 NLRB 638 (1982) (the Board found that unauthorized dissemination of internal confidential wage information was not protected); *Clinton Corn Processing Co.*, 253 NLRB 622, 623–625 (1980) (discharge of payroll clerk lawful where she disclosed confidential wage and salary information). These cases are distinguishable from the instant case because in addition to failing to establish that the questioned conduct was protected, the evidence failed to establish that the employee was engaged in concerted activity for mutual aid or protection.

employer's right to keep such information maintained in its files confidential. The Board held that the employer did not violate the Act by discharging the employee for violating its confidentiality policy, even though, the same conduct, absent the confidentiality policy, would have been protected concerted activity. Id.

As discussed above, I credit Andrew's testimony that he was trying to be prepared for what he believed would be upcoming work when he happened across the payroll information. There was no logical explanation for why he would have looked for the Respondent's payroll information in the Cunningham iDeals file. Management's argument that he had to be looking for it, because they found it hard to find and that the file contained multiple layers of subfolders, does not convince me otherwise. Management knew that Andrew and Nicholas are skilled at quickly combing through electronic documents. Furthermore, management's conclusion was based upon conjecture without interviewing them about how they located the file. Accordingly, I find that at best, the Respondent had a mistaken belief that Andrew and Nicholas acted improperly in finding the payroll file.[14]

Assuming, as I have found, that Andrew accidentally accessed the payroll and other personal information, the question remains as to whether his and Nicholas' conduct after becoming aware of the information removed them from the protection of the Act. Based on Myers notes and statements during the discharge meeting, the Respondent discharged them because they lost faith in them after they attempted to use the information they found for a financial gain. The Respondent later pointed to its employee handbook and the policy manual that Myers directed employees to follow as support for their claim that the Definis brothers improperly used the information to seek wage increases. First, I find that Andrew and Nicholas did not violate Respondent's employee handbook. The employee handbook specifically that discipline would occur as a result of sharing confidential information with those outside of the Respondent's employment. The record contains no evidence that they shared the information with anyone outside Respondent's employment; therefore, the employee handbook does not call for discipline based on Andrew's and Nicholas' conduct.

The language of the policy manual makes its scope less readily apparent, but I also find that Andrew and Nicholas did not violate the policy manual. It explicitly requires that client information remain confidential. Other language in the policy manual limits use of the Respondent's "proprietary information" and the use of the Company's property. The term property is defined as "both tangible and intangible property, including funds, premises, equipment, supplies, information, business plans, business opportunities, confidential research, intellectual property, proprietary processes, and ideas for new research or services." I find that the payroll document that Andrew found included nonpublic personal information and arguably proprietary information. It lists salaries, insurance, and 401(k) benefit costs for employees of the Respondent and for a few employees that appear to work for sister companies. Other documents that Andrew accessed and discussed with Nicholas also contained nonpublic personal information. The question then becomes whether they improperly used information as is proscribed by the policy manual.

[14] I note that Nicholas played no role in finding the file. He simply received it via a Teams message from Andrew. Any finding that Andrew engaged in wrongful conduct in finding and sharing the file is not attributable to Nicholas.

I find that the policy manual's intent, like the employee handbook, is to prevent the use of the various types of information in outside work, business opportunities, or investments. The policy manual specifically limits the use of information gained through the Respondent in outside endeavors and employment. While it restricts the use of a broad range of information and employer property, the overall context of the manual is to restrict use of this information in outside work or investments as is noted in the "background" section of the policy. Applying these restrictions to the use of information, proprietary property, and company equipment within the company and amongst Respondent's employees would prevent them from carrying out their work duties, which required them to share and discuss confidential information, use company equipment, etc. I note that Myers and Povedano testified that they had lost trust in Andrew and Nicholas, not that they violated any specific policy. Therefore, I find that Andrew and Nicholas were not, in fact, guilty of improperly accessing information or violating the employee handbook or policy manual.[15] The Respondent's loss of trust in their future ability to abide by company rules does not equate to them having engaged in misconduct by discussing and using the payroll information that Andrew accidentally found in a concerted effort to garner higher wages. Because the evidence does not support a finding that the Respondent had a good faith belief that they had engaged in misconduct sufficient to remove them from the protection of the Act, I find that their discharges violated Section 8(a)(1) of the Act.

Wright Line Analysis

In *General Motors*, the Board extended the *Wright Line* mixed-motive test to cases in which an employee engages in a single instance of abusive behavior that, apart from its abusive nature, would be protected under Section 7. The Board in *General Motors* discussed mixed motive cases where the alleged protected concerted activity also involved alleged abusive conduct such as profane or threatening language or striker misconduct, and exempted cases involving mere disparagement or disloyalty. Supra, at 9 fn.16. While the circumstances of this case are distinguishable from the *General Motors* case and the lines of cases it overturned, it is similar in the sense that the alleged misconduct for which the Respondent contends it discharged the Definis brothers was arguably part of the same *res gestae* as their concerted request for wage increases. Furthermore, the Respondent claims that it had separate motives for discharging them by arguing that they inappropriately searched for the payroll information and then broke company policies by referring to the payroll information when seeking wage increases.

[15] The Board in *IBM*, and other related cases discussed above, where employees were explicitly prohibited by work rules or were aware of their duty by function of their positions to keep confidential certain information contained in employer records from fellow employees, has found no violation when they were disciplined for using that information to engage in concerted activity. In *IBM*, the Board balanced the employer's interest in maintaining its confidentiality provisions against employees' rights to engage in protected concerted activity and held that an employer can maintain lawful provisions that preclude the use of employer confidential information such as wage information by employees in protected concerted activity. Here, the Respondent's employee handbook and policy manual did not apply to Andrew's and Nicholas' conduct, and they did not regularly work with employee confidential information such as a human resource employee to which the Board has inferred a known duty to maintain such employee records as confidential. Furthermore, Myers and other members of management had generally discussed employee wage framework. Such discussions do not support an argument that employees were required and were aware of the requirement to not discuss such information.

Under the *Wright Line* test, for mixed-motive cases the General Counsel must first "make a *prima facie* showing that the employee's conduct protected by § 7 was a substantial or a motivating factor in the discharge." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–400 (1983). This burden is typically met by showing the employee engaged in protected concerted activity, employer knowledge of that activity, and animus on the part of the employer towards that activity. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); see also *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (noting that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation").

If General Counsel meets this initial burden, then the burden shifts to the employer to prove that it would have taken the same action even in the absence of the employee's union or protected activity. *Transportation Management*, supra at 400; *Adams & Associates, Inc.*, 363 NLRB 1923, 1928 (2016); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir. 2015); *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011) (if General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial). The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. *Pro-Spec Painting*, 339 NLRB 946, 949 (2003) (noting that where an employer's reasons are false, it can be inferred that the real motive is unlawful if the surrounding facts reinforce that inference.); *Frank Black Mechanical Services, Inc.*, 271 NLRB 1302, 1302 fn. 2 (1984) (noting that "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel").

Protected Concerted Activity and Respondent Knowledge

As discussed above, the evidence establishes that Andrew and Nicholas engaged in protected concerted activities by discussing and requesting wage increases, and the Respondent was aware of this activity based upon their instant message to and conversation with Myers. Furthermore, I find that the evidence establishes beyond a preponderance of the evidence that their request for wage increases was a substantial or motivating factor in their discharge.

The record does not contain direct statements evidencing the Respondent's animus towards their protected activity. In the absence of direct evidence, the Board considers circumstantial evidence such as timing of the discharge, failure to fully investigate the alleged misconduct, and changing defenses to establish animus. *Medic One*, supra, at 475. Here, the Respondent discharged them within days of their meeting with Myers, conducted a limited investigation that did not even involve interviewing Andrew and Nicholas, and later claimed that they were discharged for violating the employee handbook and policy manual. Furthermore, based upon Myers and Povedano's statements at the discharge meeting and the notes that Myers relied upon during the discharge meeting, it was their allegedly unauthorized search for and use

of the payroll information in requesting a financial benefit/wage increases that resulted in the Respondent's loss of trust in them, and therefore, their discharge.

The Respondent claims that it holds no animus against employees for discussing wages and openly allowed employees to engage in those discussions. I note that these discussions never involved employees' actual wages or any commitment as to how bonuses would be calculated. Even Myers did not know the wages of employees working under him or with him. Myers recommended that Andrew and Nicholas not discuss wages with other employees, and employees had no understanding of the bonus structure to which management frequently referred but never explained. Considering the timing of the discharges, the limited investigation into their conduct, and the Respondent's later assertions of policy violations, I find the Respondent's animus towards Andrew and Nicholas concerted activity of requesting wage increases can be inferred from the totality of the circumstances. I find that their concerted activity of asking for wage increases was central to Respondent's loss of trust in them.

The Respondent submitted evidence to rebut any finding that the General Counsel met its burden of establishing a prima facie case. The Respondent argues that the discharges were motivated by Andrew's and Nicholas' searched for the payroll information and that they violated the employee handbook and policy manual by using that improperly obtained information to seek a financial gain. As discussed above, I find the Respondent's conclusion that they improperly searched for the payroll information is unreasonable under the circumstances, and there is no evidence that Nicholas engaged in any search. Also as discussed above, the Respondent's arguments that they violated the employee handbook and policy manual is pretext. A review of the provisions does not support a finding that their actions violated the provisions. Significantly, the Respondent's officials who testified about the reasons for the discharges and the notes relied upon by Myers during the discharge meeting did not list violations of these policies as reasons for the discharge. Therefore, I find that the reason for discharge was not due to any violation of company policies. Instead, management officials testified that they discharged them because they lost trust in them, because they referenced information that Andrew happened upon in internal discussions with each other and management about wage increases. Their loss of trust is inextricably connected to Andrew's and Nicholas' protected concerted requests for pay increases. Therefore, I find that Respondent would not have taken the same action absent their protected concerted activity. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by discharging Andrew and Nicholas.

CONCLUSIONS OF LAW

1. The Respondent, Vesta VFO, LLC, is an employer engaged in commerce out of its Lower Gwynedd, Pennsylvania facility within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act, on about December 6, 2019, by discharging Andrew Definis and Nicholas Definis because they engaged in protected concerted activity of discussing and seeking pay increases.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully discharged Andrew Definis and Nicholas Definis, I recommend an order requiring the Respondent to offer Andrew Definis and Nicholas Definis full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with the recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Andrew Definis and Nicholas Definis for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, I recommend that the Respondent be ordered to compensate Andrew Definis and Nicholas Definis, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). In addition to the backpay-allocation report, the Respondent shall be ordered to file with the Regional Director for Region 4 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award. *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021). Finally, the Respondent shall be ordered to remove from its files any reference that it discharged Andrew Definis and Nicholas Definis, and to notify them in writing that this has been done and that these adverse actions will not be used against them in any way.

The Respondent having been found to have engaged in violations of the Act, I recommend that the Respondent be ordered to post at its facility in Lower Gwynedd, Pennsylvania, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language to all

current employees and former employees employed by the Respondent at any time since December 6, 2019.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[16]

ORDER

Respondent, Vesta VFO, LLC, in Andrew Definis and Nicholas Definis, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their protected concerted activity.

(b) In any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Andrew Definis and Nicholas Definis full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Andrew Definis and Nicholas Definis whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

(c) Compensate Andrew Definis and Nicholas Definis for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) File with the Regional Director for Region 25 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Andrew Definis and Nicholas Definis and, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Lower Gwynedd, Pennsylvania, copies of the attached notice marked "Appendix"[17] copies of the notice, on forms

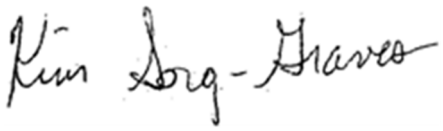
[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by

provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, since the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language to all current employees and former employees employed by the Respondent at any time since January 2019.

(h) Within 21 days after service by the Region, file with the Regional Director of Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

DATED, WASHINGTON, D.C., MAY 25, 2022.



KIMBERLY R. SORG-GRAVES
ADMINISTRATIVE LAW JUDGE

electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT
FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT discharge you because of your protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer Andrew Definis and Nicholas Definis full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Andrew Definis and Nicholas Definis whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL compensate Andrew Definis and Nicholas Definis for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remove from our files any reference to our unlawful suspensions and discharges of Andrew Definis and Nicholas Definis, and we will notify each of them in writing that this has been done and that their discharges will not be used against them in any way.

VESTA VFO, LLC

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency credited in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employees and unions. To find out more about your rights under the Act and how to file a charge or elective petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

Wanamaker Building, 100 East Penn Square, Suite 403, Philadelphia, PA 19107
(215) 597-7601, Hours 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-260273 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

THIS IS AN OFFICE NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUSRT NOT BE ALTERED, DEFACED, OPR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLAINCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (215) 597-5354.